STATE OF MICHIGAN

IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC, Petitioner-Appellant, v TOWNSHIP OF MARION, Respondent-Appellee.	Supreme Court No. 130698 Court of Appeals No. 262437 Michigan Tax Tribunal No. 307906

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PETITIONER-APPELLANT HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC'S SUPPLEMENTAL BRIEF

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INTRODUCTION

When special assessments are levied to pay for public improvements, the Tax Tribunal Act, 1973 PA 186, MCL 205.701-205.779, allows property owners to seek relief at the Michigan Tax Tribunal ("MTT") when an assessing township substantially alters the public improvement project plan and materially affects the benefit conferred to the owner's property. The Public Improvements Act, 1954 PA 188, MCL 41.721 - 41.738 ("Act 188"), prescribes the statutory process for adopting and completing public improvement projects. The Tax Tribunal Act and Act 188 contain protest and timing requirements for bringing a special assessment challenge at the MTT. If a township fails to follow Act 188's statutory process in altering a public improvement project plan, however, decisions of this Court require, as due process, waiver of these protest and timing requirements.

In this case, Appellee Township of Marion ("Township") substantially reduced the public improvement's benefit to Highland's property by adopting a resolution changing the public improvement's design plan after the Township had issued the public notice, conducted public hearings and confirmed the special assessment roll. The Township's actions, including its adoption of the May 13, 2004 resolution, are incompatible with Act 188's process and fundamental due process. Highland respectfully requests that the Court peremptorily reverse the MTT and Court of Appeals decisions and remand this case to the MTT for a determination as to whether the Township's subsequent change to the public improvement plan results in a special assessment that is disproportionate to the benefit the public improvement confers and, if so, to order appropriate relief. In the alternative, Highland respectfully requests that the Court grant it leave and upon review, reverse the Court of Appeals and MTT decisions.

SUPPLEMENTAL STATEMENT OF MATERIAL PROCEEDINGS

On June 30, 2006, the Court issued an order directing its Clerk to schedule oral argument on whether to grant Highland's application for leave to appeal or take other peremptory action. The Court's order also authorized Highland and the Township to file supplemental briefs addressing the following three issues:

> (1) the manner in which a property owner subject to special assessment for a planned improvement may seek relief when there is a subsequent change to the plan that materially affects the benefit to the owner's property;
>
> (2) whether the Township's May 13, 2004 resolution ratifying certain plan changes is tantamount to a resolution approving plan changes under Section 5(1)(b) of 1954 PA 188 ("Act 188"), MCL 41.725(1)(b); and
>
> (3) if so, whether property owners like Highland are entitled to seek relief under Section 6(3) of Act 188, MCL 41.726(3).

Highland files this supplemental brief to address the questions raised in the Court's June 30, 2006 order.

SUPPLEMENTAL ARGUMENT

I. THE TAX TRIBUNAL ACT ENTITLES A SPECIALLY ASSESSED PROPERTY OWNER TO SEEK RELIEF AT THE MTT WHEN A TOWNSHIP MAKES A SUBSEQUENT CHANGE TO THE PUBLIC IMPROVEMENT PLAN THAT MATERIALLY AFFECTS THE BENEFIT TO THE OWNER'S PROPERTY. PROTEST AND TIME REQUIREMENTS ARE ENFORCED WHEN THE TOWNSHIP'S ACTIONS CONFORM TO ACT 188'S STATUTORY PROCESS, BUT ARE WAIVED WHEN THE TOWNSHIP FAILS TO COMPLY WITH ACT 188'S STATUTORY PROCESS.

The Tax Tribunal Act entitles a property owner to seek relief at the MTT when a township changes a public improvement plan. Where the township adheres to the process mandated by Act 188, i.e., if the change is completed in a manner that complies with Act 188's statutory process, the property owner first must protest the special assessment at the public hearing held under Section 4 of Public Act 188 for the purpose of confirming the special

assessment roll. The property owner also must file its petition at the MTT within 30-days[1] after the date of the assessment's confirmation.

If, as in this case, a township makes the subsequent change through formal or informal actions that do not conform with Act 188's statutory process, for property owners seeking relief at the MTT, under decisions of this Court, all protest and timing requirements are waived consistent with fundamental due process.

A. Assuming A Township Takes Formal Action That Complies With Act 188's Statutory Process To Change The Public Improvement Plan, A Property Owner May Seek Relief At The MTT By First Protesting The Assessment At The Designated Public Hearing And By Filing A Petition Within 30 Days Of The Assessment Roll's Confirmation.

1. Three Opportunities Exist For Changing A Public Improvement Plan In Compliance With Act 188's Statutory Process And Fundamental Due Process.

Act 188 has been recognized as "a rather elaborate and lengthy **process** designed to determine the need for and assess the cost of public improvements." *Rusak v Acme Twp*, 124 Mich App 805, 813; 336 NW2d 771 (1983) (emphasis added). Within this elaborate and lengthy process, Act 188 explicitly provides two opportunities at which a township may change its public improvement project plan **before** the special assessment's confirmation, including:

> (1) after the public hearing mandated by Section 4; and
>
> (2) at or after the public hearing mandated by Section 6(1) but before the special assessment roll is confirmed.

See MCL 41.724 (2), 41.725 and 41.726 (2).

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[1] At all times relevant to this case, the Tax Tribunal Act and Act 188 both imposed 30-day filing requirements. Section 35 of the Tax Tribunal Act was amended in 2006 to impose a 35-day filing limitation. *See* 2006 PA 174. The 2006 amendment added a new subsection (1) and renumbered the other subsections. This brief refers to the statutory sections in Section 35 at the time this case arose.

Act 188 also contemplates the possibility of project changes **after** the special assessment has been confirmed. Section 13 of Act 188 thus provides:

> Whenever any special assessment shall, in the opinion of the township board, be invalid by reason of irregularities or informalities in the proceedings, or if any court of competent jurisdiction shall adjudge the assessment to be illegal, the township board shall, whether the improvement has been made or not, whether any part of the assessment has been paid or not, have the power to proceed from the last step at which the proceedings were legal and cause a new assessment to be made for the same purpose for which the former assessment was made. All proceedings on such reassessment and for the collection thereof shall be conducted in the same manner as provided for in the original assessment, and whenever an assessment or any part thereof levied upon any premises has been so set aside, if the same has been paid and not refunded, the payment so made shall be applied upon the reassessment.

MCL 41.733. Section 13 is the only provision in Act 188 that even remotely contemplates post-levy changes — and it does so with a preservation of due process for the property owner, including a right to challenge the township's actions.

2. <u>The MTT Has Jurisdiction To Consider A Property Owner's Special Assessment Protest, Including A Challenge To Proportionality, If A Township Adheres To Act 188's Statutory Procedures In Changing The Public Improvement Plan.</u>

a. <u>The Tax Tribunal Act, Not Act 188, Grants The MTT Jurisdiction To Consider A Property Owner's Special Assessment Protest.</u>

It is the Tax Tribunal Act, not Act 188, that defines the MTT's jurisdiction and prescribes its powers. The Tax Tribunal Act's preamble describes the Act as one "to create the tax tribunal; to provide for personnel, jurisdiction, functions, practice and procedure; to provide for appeals; and to prescribe the powers and duties of certain state agencies; and to abolish certain boards." 1954 PA 188, Preamble. Section 31(a) of the Tax Tribunal Act grants the MTT "exclusive and original jurisdiction" over "[a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, **special assessments**, allocation, or equalization, under property tax laws." MCL 205.731(a) (emphasis

added). Section 31(b) of the Tax Tribunal Act also grants the MTT "exclusive and original jurisdiction" over "[a] proceeding for **refund** or redetermination of a tax under the property tax laws." MCL 205.731(b) (emphasis added). In contrast to the Tax Tribunal Act, Act 188 contains no language granting the MTT jurisdiction over special assessment disputes. Indeed, Section 6(3) of Act 188 merely directs a property owner to file its petition "in a court of competition jurisdiction" within a 30-day deadline. MCL 41.726(3).

A proceeding to contest a special assessment, including its proportionality to the benefit conferred to the property, is within the MTT's jurisdiction under Section 31(a) of the Tax Tribunal Act because the protest relates to a "special assessment . . . under property tax laws." "The words 'special assessments' refer to pecuniary exactions made by the government for a special purpose or local improvement apportioned according to the benefits received." *Wikman v City of Novi*, 413 Mich 617, 633; 322 NW2d 103 (1982). "[S]pecial assessments levied against property owners for public improvements to realty which especially benefit their property are special assessments under the property tax laws for the purposes of the Tax Tribunal Act." *Id.* at 636.

A proceeding to contest a special assessment, including its proportionality to the benefit conferred to the property, also can fall within the MTT's jurisdiction over "refunds" under Section 31(b) of the Tax Tribunal Act. As in this case, such a claim would seek a refund of the special assessment amount overpaid in light of the benefit conferred.

3. Where A Township Takes Formal Action That Complies With Act 188's Statutory Process To Change The Public Improvement Plan, A Property Owner Must Protest Its Assessment At The Designated Public Hearing And File A Petition At The MTT Within 30 Days Of The Special Assessment's Confirmation.

The Tax Tribunal Act and Act 188 both contain protest requirements for prosecuting special assessment cases. Section 35(1) of the Tax Tribunal Act requires that "for a special

assessment dispute, the special assessment must be protested at the hearing held for the purpose of confirming the special assessment roll before the tribunal acquires jurisdiction of the dispute." MCL 205.735(1). Section 6(1) of Act 188 similarly requires that "[a] person objecting to the assessment roll shall file the objection in writing with the township clerk before the close of the hearing [held under Section 4 of Act 188] or within such further time as the township board may grant." MCL 41.726(2).

The Tax Tribunal Act and Act 188 also set forth timing requirements for asserting a special assessment challenge. Section 35(2) of the Tax Tribunal Act states that "the jurisdiction of the tribunal is invoked by a party in interest, as petitioner, filing a written petition within 30 days after the final decision, ruling, determination, or order that the petitioner seeks to review." MCL 205.735(2). Section 6(3) of Act 188 provides that all assessments are final and conclusive "unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation." MCL 41.726(3).

If a township has complied with Act 188's statutory procedures, the property owner will have received notice of the township's public improvement plan changes and the property owner's right to protest special assessment's confirmation. Where the property owner has received such due process under Sections 4(2), (5) and (6)(2) of Act 188, the protest and timing requirements have been enforced as a prerequisite to the MTT's consideration of any special assessment challenge. *See Dow v State of Michigan*, 396 Mich 192; 240 NW2d 450 (1976) (this Court concluding that a hearing is required by the due process clauses of both the United States and Michigan Constitutions before the government can levy assessments); *Alan v Wayne County*, 388 Mich 210, 352-353; 200 NW2d 628 (1972) (this Court stating the government has a

constitutional and statutory duty to provide full explanatory and accurate notice when using its taxing powers).

In *Szymanski v City of Westland*, 420 Mich 301; 362 NW2d 224 (1984), for example, the protest and timing requirements were enforced where no notice issue was implicated. The *Szymanski* plaintiffs, claiming to be representatives of a class of property owners, filed a petition at the MTT alleging that a special assessment levied by the municipality for a paving project was unconstitutional because property values would not be enhanced by the improvement. *Id.* at 302. The MTT dismissed the petition for lack of jurisdiction because the plaintiffs had neglected to file the petition within the 30-day period provided by the Tax Tribunal Act.[2] *Id.* at 303. In affirming the MTT and the Court of Appeals decisions, this Court held that the MTT was without jurisdiction to consider the plaintiffs' petition because it was not filed within the Tax Tribunal Act's 30-day period and plaintiffs cited no other provision granting a longer period to file the petition.

Similarly, in *Wikman v City of Novi*, *supra*, property owners brought an action in circuit court against a municipality seeking injunctive relief from a special assessment relating to the improvement of a public road. *Id.*, 413 Mich at 625-626. The case did not involve allegations of lack of or defective notice. *Id.* at 630. The Court of Appeals ruled that the MTT had exclusive jurisdiction over the special assessment dispute and remanded the case to the MTT. On appeal to this Court, the defendants argued that the Court of Appeals erred in remanding the case because petitioners had failed to file their petition within the 30-day period provided in the Tax Tribunal

[2] In *Szymanski, supra*, the municipality's city code provided that special assessment rolls were not "finally confirmed" until after notice of the assessments was published, posted, and sent by first class mail to all affected property owners and after public hearings regarding the assessments were conducted. The plaintiffs had filed their petition 195 days after the "last final confirmation" of the assessment rolls. *Szymanski, supra,* 420 Mich at 302.

Act and the MTT lacked jurisdiction over the case. In reviewing the language of Section 35 of the Tax Tribunal Act, the Court observed:

> Although [Section 35] provides that the tribunal's jurisdiction shall be invoked by a timely filing, the statute does not state the consequences of failing to file a timely petition. It does not contain any language prohibiting the tribunal from exercising jurisdiction in cases filed later than 30 days after a final ruling or receipt of a tax bill. It contains none of the prohibitive language normally present in statutory limitations.

Id. at 651. The Court then held that the Tax Tribunal Act's 30-day limitation applies if no other provision grants a longer time period. *Id.* at 653. Because the municipality's ordinance stated that challenges must be brought within 60 days after the special assessment roll's confirmation, the Court determined the 30-day limitation was not controlling. *Id.* at 650, 654.

Consequently, if a township changes public improvement plans in conformity with Act 188 procedures and creates no notice defect, the protest and timing requirements will not be excused in any special assessment challenge initiated at the MTT because the property owner has received due process.

B. If A Township Takes Formal Or Informal Action That Does Not Comply With The Act 188 Statutory Process, The Tax Tribunal Act Also Entitles A Property Owner To Seek Relief At The MTT, But The Protest And Timing Requirements Are Waived Because Act 188's Due Process Protections Have Not Been Satisfied.

The Tax Tribunal Act grants the MTT jurisdiction over special assessment matters and refund proceedings. The MTT is able to exercise its jurisdiction if a final decision, final ruling, determination, or order of the township exists for the property owner to challenge. MCL 205.732.

Act 188 establishes an orderly procedure for levying special assessments. *Rusak v Acme Twp, supra,* 124 Mich App at 813. This orderly procedure is designed to ensure that property owners receive adequate due process, including notice and an opportunity to challenge the

assessment, when a township assesses property owners for a local improvement. Decisions of this Court prohibit townships from depriving property owners of their due process entitlement without consequence. As such, protest and timing requirements are waived when a township fails to follow Act 188's orderly procedure in changing public improvement plans.

1. The MTT Has Jurisdiction To Consider A Petition Brought By A Property Owner Challenging A Subsequent Change To The Plan That Materially Affects The Benefit To The Owner's Property.

The Tax Tribunal Act empowers property owners to seek relief at the MTT if a township uses formal or informal action to make a subsequent change to the public improvement plan that materially affects the benefit to the owner's property, even if that township action does not comply with the procedure established in Act 188. Such a petition would relate to a "special assessment" under Section 31(a) of the Tax Tribunal Act. MCL 205.731(a); *Wikman*, *supra,* 413 Mich at 633, 636. Further, if a township has engaged in a formal or informal action that is not in compliance with Act 188's statutory procedures, a "final decision, finding, ruling, determination, or order of any agency" would exist sufficient to allow a property owner to bring a challenge at the MTT. MCL 205.731(a). Likewise, if the property owner sought a refund because it believed the assessment was disproportionate to the changed benefit, the challenge would relate to "[a] proceeding for refund" under Section 31(b). MCL 205.731(b).

2. Due Process Requires That Protest And Timing Requirements Be Waived When A Township Fails To Follow Act 188's Statutory Procedures.

As discussed *supra* at pages 5 through 6, both the Tax Tribunal Act and Act 188 contain protest and timing requirements for proceedings involving special assessments. Several appellate decisions, including at least two decisions from this Court, illustrate that protest and timing requirements are waived when a governmental entity fails to follow statutory procedures designed to ensure that property owners and taxpayers receive adequate due process.

a. This Court's *Burnside* and *Szymanski* Decisions Illustrate That Protest And Timing Requirements Are Waived When A Governmental Entity Fails To Follow Statutory Procedures, Including The Provision Of Notice.

This Court's decision in *W&E Burnside, Inc v Bangor Township*, 402 Mich 950l; 314 NW2d 196 (1978) suggests that protest and timing requirements are waived when a governmental entity fails to follow statutory procedures in levying assessments, including the failure to provide statutory notice. *Burnside* involved a challenge to a property tax assessment. The *Burnside* plaintiffs first learned that the township was increasing their property tax assessment when they received their annual tax statement. *W&E Burnside, Inc v Bangor Township*, 77 Mich App 618, 620; 259 NW2d 160 (1977), *rev* 402 Mich 950l; 314 NW2d 196 (1978). Plaintiffs paid the property tax under protest and filed an action in circuit court alleging that the property valuation and assessment were excessive. *Id.* The parties subsequently stipulated to move the action to the MTT, but the MTT dismissed the case on the basis that plaintiffs had failed to exhaust their administrative remedies because they had not protested the property valuation increase before the board of review as required by Section 35 of the Tax Tribunal Act. *Id.*

The plaintiffs argued on appeal that the assessment increase was void because, contrary to the statute, the township did not send them notice of the increase by first class mail and they did not receive notice of the increase until after the board of review meetings had already occurred. *W&E Burnside, Inc v Bangor Township*, 77 Mich App at 621. The Court of Appeals first determined that notice is a prerequisite to a valid tax assessment increase when notice is required by statute:

> It is necessary to give full effect to the notice statute for any other interpretation would mean that in situations such as the one herein presented where the tax statements (actual notice of the increase) post dates the board of review meeting,

> the opportunity to be heard would be foreclosed to the taxpayer and the purpose of the statute not achieved.

Id. at 623-624. The Court of Appeals then held that it was appropriate to remand the case to the circuit court for a determination whether notice was mandatory. *Id.* at 624. In determining that the case should be remanded to circuit court, the Court of Appeals held that the MTT did not have jurisdiction to consider plaintiffs' case because Section 35's protest requirements were not met. The Court of Appeals thus remanded the case to the circuit court, instructing the court to order a refund of the assessment increase to the plaintiffs if it were determined that notice was mandatory. *Id.* at 624.

In lieu of granting leave to appeal, this Court reversed the Court of Appeals and remanded the case to the MTT. *Burnside v Bangor Township*, *supra* at 402 Mich 950l. The Court stated:

> If the tribunal determines a notice should have been sent, the assessment increase is invalid and plaintiff is entitled to a refund. If the tribunal determines no notice was required, the tribunal must still determine whether or not the assessment increase was excessive, and that there is no other bar to granting relief.

Id. at 950l.

This Court's decision in *Szymanski v City of Westland*, also recognizes that compliance with the Tax Tribunal Act's timing and protest requirements may be waived where the assessing governmental entity does not satisfy its statutory duty to provide notice. Although the Court determined that the MTT was without jurisdiction to consider plaintiffs' petition because it was not filed within the 30-day period provided by the Tax Tribunal Act, the Court explicitly stated that "**[i]t should be noted that the plaintiffs do not challenge the adequacies of the notices they received.**" *Id.*, 420 Mich at 305, fn 3 (emphasis added).

b. **The Court of Appeals' *Parkview* and *Henal* Decisions Also Recognize That Due Process Requires Adequate Notice And Illustrate That Protest And Timing Requirements Are Waived When A Governmental Entity Fails To Follow Statutory Procedures, Including The Provision Of Notice.**

Several Court of Appeals decisions also have determined that it is appropriate to waive protest and timing requirements when a governmental entity fails to provide the proper statutory notice. In *Parkview Memorial Assoc v City of Livonia*, 183 Mich App 116; 454 NW2d 169 (1990), the petitioners received property tax assessment notices that assessed petitioners for burial tombs. *Id.* at 117-118. The petitioners did not receive the property tax notices until two days after the board of review had convened. *Id.* at 118. Seven days after receiving the tax notices, petitioners filed petitions at the MTT alleging that burial tombs used and reserved for perpetual burial purposes are exempt from taxation and thus the City's property valuations were excessive. *Id.* The MTT dismissed the petitions for lack of jurisdiction on the ground that the petitions were not timely filed. *Id.*

Applying this Court's *Burnside* decision, the Court of Appeals reversed the MTT's dismissal of the petitions and remanded the cases to the MTT for further proceedings. The Court of Appeals determined that the MTT's protest and filing deadline requirements were not jurisdictional requirements but procedural requirements for perfecting an appeal. The Court stated:

> We adopt the Supreme Court's remedial approach in *Burnside* here . . . . [R]espondents' late notices were not given in a manner reasonably calculated under all the circumstances to apprise petitioners of the assessments and to afford them an opportunity to be heard . . . . Petitioners thus will be denied due process unless they are given an opportunity to be heard.
>
> * * *

> Considering the requirements of [Section 35 of the Tax Tribunal Act] as procedural requirements for the perfection of an appeal of an assessment is consistent with the remedy fashioned for the plaintiffs in the Supreme Court's *Burnside* decision. It affords taxpayers such as petitioners and the *Burnside* plaintiffs, who demonstrate that they have been deprived of notice of an assessment in time to protest before the board of review, an opportunity to obtain a review of the assessment in the Tax Tribunal.

Id. at 120-121. Similarly, in *Henal Realty Co v Brownstown Township*, 90 Mich App 374; 282 NW2d 325 (1979), the Court of Appeals applied this Court's *Burnside* decision and remanded the case to the MTT for a determination whether notice was required to be sent to the plaintiff. [3]

In conflict with these decisions, in a recent unpublished decision not binding on this Court, *Pacific Properties, LLC v Township of Shelby*, unpublished *per curiam* of the Court of Appeals, decided March 1, 2005 (Docket No. 249945), the Court of Appeals determined that the time limits in Section 35 of the Tax Tribunal Act are jurisdictional and cannot be waived even if a property owner received insufficient notice of the assessment or change in assessment. The township in *Pacific Properties* erroneously revised the assessed and taxable value of the plaintiff's property for years 1999 and 2000 to include the value of a building that was not located on the property. *Id.* at 1. Plaintiff did not receive notice of the change until January 2001 when it received a revised tax bill for year 2000. Plaintiff did not learn the reasons for the erroneous assessment until the township sent it a letter in April 2003 advising plaintiff of its error. *Id.*

[3] Where improper notice was given by the municipality so that the property owner was deprived of an opportunity to protest at the board of review or timely file a challenge to the assessment at the MTT, two Court of Appeals cases determined the MTT was without jurisdiction to consider the challenges but that the assessments were **outright invalid and illegal**. *See Sisters of Mercy v Pennfield Township*, 91 Mich App 470; 283 NW2d 645 (1979) and *Rochester Meadows Apartments v City of Rochester*, 112 Mich App 319; 316 NW2d 242 (1982). These cases are distinguishable and their continued validity questionable because they rely on the Court of Appeals' *Burnside* decision, which later was summarily reversed by this Court. Further, the cases would require a property owner to file a futile petition at the MTT solely to enable it to claim relief at the appellate level.

Plaintiff and the township jointly sought relief at the MTT, seeking to correct the assessment rolls. *Pacific Properties, supra* at 2. The MTT determined that it lacked jurisdiction over the assessments because plaintiff had failed to appeal timely the changed assessments in accordance with the time limits required by MCL 211.27b and Section 35 of the Tax Tribunal Act. *Id.* The MTT further determined that the parties could not waive the statutory deadline because compliance was required to invoke the MTT's jurisdiction and, although MCL 211.53a provides an exception to the jurisdictional time limits of Section 35 for mutual mistakes, no mutual mistake occurred. *Id.*

On appeal, the Court of Appeals determined that the MTT had subject matter jurisdiction over the issue under Section 31's plain language, but jurisdiction was not properly invoked because Section 35's protest and timing requirements had not been satisfied. The Court of Appeals rejected plaintiff's reliance on *Parkview Memorial, supra*, for the proposition that the time limits in Section 35(2) are not jurisdictional but procedural requirements. *Pacific Properties, supra* at 4. In addition to observing that *Parkview* was decided before November 1990 and thus not binding precedent, the Court determined that this Court's *Szymanski* and *Wikman* decisions held that Section 35's time requirements are jurisdictional and cannot be waived unless another provision with a longer period of limitation exists. *Id.*

The *Pacific Properties* decision is faulty because it fails to consider this Court's *Burnside* decision, which specifically addressed circumstances where deficient notice was provided, and instead relies upon the *Szymanski* and *Wikman* cases even though those decisions do not involve improper notice. In fact, the *Pacific Properties* decision omits any discussion of this Court's observation in *Szymanski* that "**[i]t should be noted that the plaintiffs do not challenge the adequacies of the notices they received**." *Id.* at 305, fn 3 (emphasis added).

II. RESPONDENT'S MAY 13, 2004 RESOLUTION RATIFYING CERTAIN PLAN CHANGES IS NOT TANTAMOUNT TO A RESOLUTION APPROVING PLAN CHANGES UNDER MCL 41.725(b).

The Township's May 13, 2004 resolution is not tantamount to a resolution approving plan changes under Section 5(b) of Act 188. The resolution does not conform with Act 188's requirements and the "elaborate and lengthy **process** designed to determine the need for and assess the cost of public improvements." *Rusak v Acme Twp, supra,* 124 Mich App at 813 (emphasis added). The May 13, 2004 resolution is completely outside Act 188's statutory sequence and is ineffective.

Section 4 of Act 188 requires the township to have definite plans describing the improvement and its location. MCL 41.724(1). Section 4(2) requires the township board to fix a time and place to hear any objections to the petition, the improvement or the special assessment district, and requires the township to provide notice of the hearing pursuant to Section 4a's requirements.[4] MCL 41.724(2). It is only at this hearing that the Legislature first has authorized the township board to "revise, correct, amend or change the plans, the estimate of cost or the special assessment district." MCL 41.724(3). In this case, there is no evidence that the Township's May 13, 2004 resolution was passed at a public hearing held in conformance with Section 4 of Act 188, that the revised design plan was published in accordance with Act 188's procedure, or that notice was provided to the public as required by Sections 4(2) and 4a of Act 188. Because of these procedural defects, the May 13, 2004 resolution is not effective under Section 4 of Act 188.

[4] Section 4a requires that each record property owner to be assessed receive notice of the hearing via first class mail at least 10 days before the hearing date. The notice also must be published twice before the hearing date, with the first publication occurring at least 10 days before the hearing. MCL 41.724a(2).

If, after the public hearing held under Section 4 of Act 188, the township board still desires to proceed with the improvements, Section 5 of Act 188 explicitly requires the township to finalize the public improvement's design plans by passing a resolution. The township either must approve the design plans as originally planned or approve the plans as revised, corrected, amended, or changed as a result of the Section 4 public hearing. Section 5 states that the township "shall approve or determine by resolution" the following: (1) the completion of the improvement; (2) "the plans and estimates as originally presented or as revised, corrected, amended, or changed"; (3) the sufficiency of the petition for the improvement, if required; and (4) the special assessment district, including the special assessment district's term. MCL 41.725(1)(a), (b), (c), (d). It also requires the township supervisor to make a special assessment roll with amounts proportionate to the benefits derived, and to certify that, to the best of his knowledge, he conformed with Michigan statutes, including Act 188. MCL 41.725(1)(2). Although the Township's May 13, 2004 resolution purported to ratify certain public improvement plan changes, the resolution did not conform with all of Section 5's requirements and is completely ineffective.

Once the Township Supervisor reports the special assessment roll to the township board, the board then must "appoint a time and place when it will meet, review, and hear any objections to the assessment roll." MCL 41.726(1). It is at this hearing or a subsequent meeting that the township board "may confirm the special assessment roll as reported to the township board by the supervisor or as amended or corrected by the township board"; "may refer the assessment roll back to the supervisor for revision"; or may "annul it and direct a new roll to be made." MCL 41.726(2). The May 13, 2004 resolution was a single resolution, and it met none of Section 6's requirements.

Finally, the Legislature contemplated the possibility of irregularities in the special assessment process and provided a specific remedy in Section 13 of Act 188, which states:

> Whenever any special assessment shall, in the opinion of the township board, be invalid by reason of irregularities or informalities in the proceedings, or if any court of competent jurisdiction shall adjudge the assessment to be illegal, the township board shall, whether the improvement has been made or not, whether any part of the assessment has been paid or not, have the power to proceed from the last step at which the proceedings were legal and cause a new assessment to be made for the same purpose for which the former assessment was made. All proceedings on such reassessment and for the collection thereof shall be conducted in the same manner as provided for in the original assessment, and whenever an assessment or any part thereof levied upon any premises has been so set aside, if the same has been paid and not refunded, the payment so made shall be applied upon the reassessment.

MCL 41.733. Section 13 is the only provision that even remotely contemplates post-levy changes — and it does so with a preservation of due process for the property owner, including a right to challenge the township's actions. Under Section 13, after the Township determined it desired to alter the public improvement design plans, the Township could have repeated the procedures outlined in Sections 4, 4a, and 5 of Act 188. It did not.[5] Instead, the Township merely adopted a single resolution that retroactively "acknowledged, approved and ratified" "all changes" in the sanitary sewer improvement project. It also incorporated the design plan alterations in previously created documents and rescinded all previous resolutions, or parts of resolutions, that were inconsistent with the May 13, 2004 resolution. The provision for changing the plans must be read in the context of the entire procedure, requiring subsequent proceedings that allow a property owner to obtain relief, not as a stand-alone provision allowing changes at any time and in isolation from the rest of the procedure for imposing a special assessment. The May 13, 2004 resolution does not comply with language or spirit of Section 13 and is ineffective.

[5] The MTT observed in dictum that the Township's informal changes were invalid.

In addition to Act 188's plain language, this Court's decision in *Thayer Lumber Co v City of Muskegon*, 152 Mich 59; 115 NW 957 (1908), also suggests the May 13, 2004 resolution is inoperative. In *Thayer*, the City attempted to specially assess for sewer improvements pursuant to its powers under the City charter. *Id.* at 60. The City adopted a resolution creating a sewer district and describing the lands to be assessed. It then published notice that it would meet on September 10, 1906 to hear objections to the sewer project and the assessments. *Id.* at 61.

The city council met on September 10, 1906 and adopted a resolution ordering the sewer plans to be amended so as to change the district boundaries and add more properties to the district. The resolution also instructed the civil engineer to prepare and file new/additional plans, specifications and edits. There was no evidence of any adjournment of the hearing of objections to the proposed sewers. *Thayer Lumber Co v City of Muskegon, supra,* 152 Mich 50 at 61.

On October 8, 1906, the council adopted another resolution declaring the construction according to the revised plans, adopting the revised plans, providing that the costs would be paid in part by special assessments, and ordering the city recorder to publish notice that the council would meet on November 5, 1906 to consider objections with respect to the sewers and the levying of special assessments. *Thayer Lumber Co v City of Muskegon, supra,* 152 Mich at 61. The resolution also stated that "[i]t is further resolved that the resolution adopted by the council on the 20th day of August, constituting a special sewer district to be known and described as Special Sewer District No. 7 in so far as it conflicts with this resolution and with the plans and diagrams and the estimates and costs of said sewers mentioned herein, be rescinded and held for naught." *Id.*

Prior to the November 5, 1906 meeting, notice was published that referenced the October 8, 1906 resolution adopting revised plans and a revised district, and advised the public that the

counsel would meet on November 5, 1906 "to consider suggestions and objections with respect to said sewers and the levying of a special assessment therefore." *Thayer Lumber Co v City of Muskegon, supra,* 152 Mich at 62. No other notice of the meeting to hear objections was given or published and the plaintiff had no other notice or knowledge of proceedings and action contemplated. All subsequent council proceedings relating to the project were based upon the October 8, 1906 resolution and none referenced the August 20, 1906 resolution. *Id.*

After the assessment roll was reported for confirmation, plaintiff filed an action alleging that all proceedings subsequent to the adoption of the August 20, 1906 resolution were irregular and defective. *Thayer Lumber Co v City of Muskegon, supra,* 152 Mich at 63. In its defense, the city argued that the subsequent proceedings were "**merely supplemental** to such former action, and, even though some of the later steps were irregular and defective, the jurisdiction once acquired by such improvement continued, and has not been lost." *Id.* at 65 (emphasis added).

The Court disagreed with the city and said that the "fatal weakness" of its argument was that the interested parties attended on September 17, 1906, and the council, instead of further adjourning or continuing the proceedings already in progress, adopted a resolution which, in substance and effect, terminated the proceedings and declared that new and original action would be taken. *Thayer Lumber Co v City of Muskegon, supra,* 152 Mich at 65. The Court stated:

> Every person present at, or having knowledge of, the adoption of that resolution, must have understood that new and different plans and diagrams were to be prepared; that a new and different sewer district was to be created; and that, when the proper legal steps had been taken to accomplish this, a time would be finalized and notice thereof duly given when all persons interested could have their day in court and have an opportunity to be heard if they so desired.

Id. The Court also observed that the revised plans were "materially different" from those described in the August 20, 1906 resolution and that "proportionate amounts" were increased.

Id. "This variance would be of itself fatal to the validity of the assessment if such assessment depended upon the earlier action of the council." *Id.* at 66.

With regard to notice, the Court stated that the November 5, 1906 meeting notice did not comply with the city's own charter (which required publication for at least two successive weeks), did not set forth the earlier proposed improvement or the district to be assessed, and did not apprise property owners of the approximate location and the property to be addressed. *Thayer Lumber Co v City of Muskegon, supra,* 152 Mich at 66-67. "From reading [the notice] no person could ascertain in what part of the city the proposed sewers were to be built, and much less whether or not his property was liable to be assessed therefore." *Id.* at 67.

III. HIGHLAND WOULD BE ENTITLED TO SEEK RELIEF AT THE MTT REGARDLESS WHETHER THE TOWNSHIP'S MAY 13, 2004 RESOLUTION RATIFYING CERTAIN PUBLIC IMPROVEMENT PLAN CHANGES WERE TANTAMOUNT TO A RESOLUTION APPROVING PLAN CHANGES UNDER MCL 41.725(1)(b). HIGHLAND'S ENTITLEMENT TO SEEK RELIEF IS NOT DEPENDENT ON MCL 41.726(3).

A property owner such as Highland would be entitled to seek relief at the MTT regardless whether the May 13, 2004 resolution were determined to be tantamount to a resolution approving plan changes under Section 5(1)(b) of Act 188. Section 31 of the Tax Tribunal Act is the legislative authority for a property owner to seek relief if a township makes subsequent plan changes because it is the that Act that grants the MTT jurisdiction over special assessments and proceedings for refunds. In contrast to the Tax Tribunal Act's explicit grant of jurisdiction to the MTT, Section 6(3) of Act 188 simply recognizes that a property owner must seek relief from a "court of competent jurisdiction." MCL 41.726(3).

As discussed *supra* at pages 9 through 14, the 30-day limitation in Section 6(3) does not preclude a property owner like Highland from seeking relief at the MTT when a township, like the Township here, completely ignores its statutory duties and attempts to materially alter a

public improvement project after the statutory time for challenging the assessment has expired. But even if the May 13, 2004 resolution were tantamount to a resolution approving changes under Section 5 of Act 188, it would operate as a "confirmation" of the altered public improvement project and as a "final finding, ruling, determination, or order" of the Township relating to a special assessment. Here, where Highland filed its petition at the MTT within 30 days after the Township's purported "confirmation" and "final finding, ruling, determination, or order," Section 6(3) would not bar Highland's action even if the May 13, 2004 resolution were determined to have effect under Act 188.

CONCLUSION

Highland-Howell Development Company, LLC respectfully requests that the Court peremptorily reverse the MTT and Court of Appeals decisions and remand this case to the MTT for a determination as to whether the Township's subsequent change to the public improvement plan results in a special assessment that is disproportionate to the benefit the public improvement confers and, if so, to order appropriate relief. In the alternative, Highland respectfully requests that the Court grant it leave and upon review, reverse the Court of Appeals and MTT decisions.

Respectfully submitted,

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